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No. 490

In the

United States Court of Appeals

For the Seventh Circuit

No. 11921

JOHN L. LEWIS, CHARLES A. OWEN and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Plaintiffs-Appellees,
vs.
QUALITY COAL CORPORATION, a Corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.

Honorable Cale J. Holder, Judge Presiding.

APPENDIX TO APPELLANT'S BRIEF.

William L. P. Burke
Frank J. McAdam, Jr.
33 N. LaSalle St.
Chicago, Ill.
Attorneys for Appellant.

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APPENDIX.

Cale J. Holder, Judge
UNITED STATES DISTRICT COURT
For the Southern District of Indiana
Terre Haute Division

JOHN L. LEWIS, CHARLES A. OWEN, and JOSEPHINE ROCHE, AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,

Plaintiffs,

v.

QUALITY COAL CORPORATION, A Corporation

Defendants.

Civil Action
No. TH55-C-50

COMPLAINT

(Filed U. S. District Court Oct 31 1955)

I

Plaintiffs are Trustees of the United Mine Workers of America Welfare and Retirement Fund, a charitable trust, with its residence and place of business at 907 Fifteenth Street, N.W., in Washington of the District of Columbia. Trustee John L. Lewis is a citizen of the State of Illinois. Trustee Charles A. Owen is a citizen of the State of Florida. Trustee Josephine Roche is a citizen of the State of Colorado. The Defendant, Quality Coal Corporation, a corporation, was duly organized and exists under and by virtue of the laws of the State of Indiana. Its principal offices are located at 111 South Forest Avenue, Brazil, Clay County, Indiana.

II

The amount in controversy, exclusive of interest and costs, exceeds Three Thousand Dollars ($3,000.00).

III

The United Mine Workers of America Welfare and Retirement Fund was created by contract dated March 5, 1950.

IV

Between the first day of October 1952 and the thirtieth day of September 1955, the Defendant, Quality Coal Corporation, was engaged in the business of operating coal mines in and about Brazil, Clay County, Indiana. On or about the fourth day of October 1952, the said Defendant, Quality Coal Corporation, signed the National Bituminous Coal Wage Agreement of 1950 as Amended September 29, 1952. Said Defendant Corporation signed a National Bituminous Coal Wage Agreement of 1950 As Amended Effective September 1, 1955, or on about August 27, 1955. Pursuant to the terms of the said 1950 Agreement as Amended the Defendant Corporation agreed to pay unto the United Mine Workers of America Welfare and Retirement Fund the sum of Forty Cents (40¢) per ton on all coal produced for use or sale on or after October 1, 1952.

V

Between December 1, 1953, and September 30, 1955, the Defendant, Quality Coal Corporation produced approximately 116,886 tons of coal for use or sale and in accordance with the terms of said National Bituminous Coal Wage Agreement of 1950 as Amended, September 29, 1952, and said Amendment effective September 1, 1955, there became due and owing to the Plaintiffs by the Defendant

Corporation the sum of Forty Six Thousand, Seven Hundred Fifty Four Dollars and Forty Cents ($46,754.40). The said Defendant Corporation made payment on this amount in the sum of Six Thousand, Seven Hundred Ninety Nine Dollars and Thirty Three Cents ($6,799.33), thereby leaving a balance due and owing by the Defendant to the Plaintiffs of Thirty Nine Thousand, Nine Hundred Fifty Five Dollars and Seven Cents ($39,955.07). The Defendant has neglected or failed to pay such amount.

VI

The Plaintiffs have demanded the Defendant Quality Coal Corporation to pay unto them said sum but the Defendant refuses and continues to refuse to make payment.

7 Wherefore, the Plaintiffs pray this Honorable Court for judgment against the Defendant, Quality Coal Corporation, a corporation, in the amount of Thirty Nine Thousand, Nine Hundred Fifty Five Dollars and Seven Cents ($39,955.07) with interest and costs and additional sum equivalent to Forty Cents (40¢) per ton plus interest and costs on each ton of coal produced for use or sale by the Defendant Corporation in excess of 116,886 tons covering the period December 1, 1953, through September 30, 1955, and subsequent thereto.

Dewey and Nattkemper
506 Ohio Street
Terre Haute, Indiana
/s/ Douglas R. Dewey
By: /s/ Louis D. Nattkemper
Louis D. Nattkemper
/s/ Val J. Mitch
Val J. Mitch
907 Fifteenth Street, N.W.
Washington, D. C.

/s/ Harold H. Bacon
Harold H. Bacon
907 Fifteenth Street, N.W.
Washington, D. C.
Attorneys for the Plaintiffs

8 And afterwards, to-wit: on the 22nd day of November, 1955, before the Honorable Cale J. Holder, Judge of said Court, the following further proceedings were had herein, to-wit:

Come now the plaintiffs and file interrogatories propounded to Carl F. Kumpf, president, Quality Coal Corp., with affidavit of service, which interrogatories read as follows:

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UNITED STATES DISTRICT COURT
For the Southern District of Indiana
Terre Haute Division

• • (Caption—No. TH55-C-50) • •

INTERROGATORIES
(Filed U. S. District Court Nov 22 1955)

Interrogatories to be propounded to Carl F. Kumpf, President, Quality Coal Corporation, and to be answered in writing under oath.

Interrogatory No. 1

Where is or was the principal office and/or place of business of the defendant coal corporation during the period December 1, 1953, through and including September 30, 1955?

Interrogatory No. 2

What is your connection with the defendant coal corporation? What duties do you perform? What position or positions have you held with the defendant coal corporation?

Interrogatory No. 3

When was the defendant coal corporation organized and for what purpose or purposes?

Interrogatory No. 4

State the name and location of each mine and/or mines owned and operated by the defendant coal corporation during the period December 1, 1953, through and including September 30, 1955.

Interrogatory No. 5

State the name and location of each mine and/or mines operated but not owned by the defendant coal corporation during the period December 1, 1953, through and including September 30, 1955.

Interrogatory No. 6

(a) If the defendant coal corporation operated a mine and/or mines not owned by the defendant coal corporation, state the name and address of the person or persons from whom the mine and/or mines were leased.

(b) Was the mine and/or mines operated under a royalty contract or arrangement?

Interrogatory No. 7

Was the defendant coal corporation engaged in the business of mining coal during the period December 1, 1953, through and including September 30, 1955?

Interrogatory No. 8

How many tons of coal did the defendant coal corporation produce at each mine for use or sale each month during the period December 1, 1953, through and including September 30, 1955?

Interrogatory No. 9

(a) Did the defendant coal corporation make payments to the United Mine Workers of America Welfare

and Retirement Fund for coal produced for use or sale during the period December 1, 1953, through and including September 30, 1955?

(b) If so, state the date and amount of each payment.

Interrogatory No. 10

(a) Did the defendant coal corporation check off union dues of its employees covered by the National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952, and the National Bituminous Coal Wage Agreement of 1950 as amended September 1, 1955, for the period December 1, 1953, through and including September 30, 1955.

(b) Did the defendant coal corporation remit such union dues to the proper offices of the United Mine Workers of America pursuant to the terms of the National Bituminous Coal Wage Agreements referred to in Interrogatory No. 10 (a)?

Interrogatory No. 11

(a) Did the defendant coal corporation by any of its officers or agents sign the National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952? If so, when?

(b) Did the defendant coal corporation by any of its officers or agents sign the National Bituminous Coal Wage Agreement of 1950 as amended September 1, 1955? If so, when?

Dewey and Nattkemper
506 Ohio Street
Terre Haute, Indiana
/s/ Douglas R. Dewey
By: /s/ Louis D. Nattkemper
Louis D. Nattkemper

11 /s/ Val J. Mitch
Val J. Mitch
907 Fifteenth Street, N. W.
Washington, D. C.
/s/ Harold H. Bacon
Harold H. Bacon
907 Fifteenth Street, N. W.
Washington, D. C.
Attorneys for Plaintiffs

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UNITED STATES DISTRICT COURT
For the Southern District of Indiana
Terre Haute Division

• • (Caption—No. TH55-C-50) • •

ANSWERS TO INTERROGATORIES
(Filed U. S. District Court Jan. 23, 1956.)

Comes now Carl F. Kumpf, President of defendant corporation of Quality Coal Corporation and in answer to interrogatories deposes and saith as follows:

Answer to Interrogatory No. 1
111 South Forest Avenue, Brazil, Indiana

Answer to Interrogatory No. 2
a) President
b) Duties of President and General Manager
c) President and General Manager

Answer to Interrogatory No. 3
In June, 1939 and for the purpose of mining coal and clay.

Answer to Interrogatory No. 4
Quality Mine, Clay County, Indiana

Answer to Interrogatory No. 5
None

Answer to Interrogatory No. 6

a) None

b) None

Answer to Interrogatory No. 7

Yes

Answer to Interrogatory No. 8

December, 1953	9,766.95 tons
January, 1954	9,122.22 "
February, 1954	6,855.00 "
March, 1954	6,097.12 "
April, 1954	2,279.40 "
May, 1954	1,990.35 "
June, 1954	1,987.60 "
July, 1954	2,238.40 "
August, 1954	3,992.95 "
September, 1954	8,430.90 "
October, 1954	7,735.15 "
November, 1954	10,768.65 "
December, 1954	11,836.82 "
January, 1955	7,177.15 "
February, 1955	4,274.22 "
March, 1955	3,914.35 "
April, 1955	1,331.20 "
May, 1955	1,399.80 "
June, 1955	1,642.75 "
July, 1955	1,743.45 "
August, 1955	6,301.10 "
September, 1955	10,083.95 "

85 **Answer to Interrogatory No. 9**

a) Yes

b)

May, 1954	$ 911.76	October, 1954	$ 496.16
November, 1954	1,547.03	December, 1954	1,435.82
January, 1955	1,284.80	September, 1955	511.52
October, 1955	612.24		

Answer to Interrogatory No. 10

a) Yes

b) Yes.

Answer to Interrogatory No. 11

a) Yes, on or about September 29, 1952

b) Yes, on or about September 1, 1955

Quality Coal Corporation
111 South Forest Avenue
Brazil, Indiana
By: /s/ Carl F. Kumpf
Carl F. Kumpf, President
Quality Coal Corporation

Sworn and subscribed to before me this 23rd day of January, 1956.

/s/ Howard C. Dean

My Commission expires May 16, 1958.
(Seal)

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UNITED STATES DISTRICT COURT
For the Southern District of Indiana

(Caption—No. TH55-C-50)

NOTICE TO TAKE DEPOSITIONS UPON ORAL EXAMINATIONS

(Filed U. S. District Court Jan 17 1956)

To John L. Lewis, Charles A. Owen
and Josephine Roche, Trustees of
The United Mine Workers of America
Welfare and Retirement Fund, A Charitable Trust,
907 Fifteenth Street, N.W.
Washington, D. C.

Please take notice that on the first day of February, 1956, at Room 129, Earle Hotel, 34 East National Avenue, Brazil, Indiana, the defendant in the above entitled action will take the deposition of the plaintiffs, John L. Lewis, Charles A. Owen and Josephine Roche, Trustees of The United Mine Workers of America Welfare And Retirement Fund, whose address is 907 Fifteenth Street, N.W., Washington D. C., upon oral examination pursuant to the Federal Rules of Civil Procedure, before Marjorie Smith Thomas, a Notary Public, or before some other officer authorized by law to take depositions. The oral examination will continue from day to day until completed.

William L. P. Burke
1005 Ambassador Building,
St. Louis, Missouri.
By /s/ William L. P. Burke
William L. P. Burke

I hereby certify that a copy of the foregoing has been mailed this 12th day of January, 1956, to Dewey & Nattkemper, 506 Ohio Street, Terre Haute, Indiana, and Mr. Val J. Mitch, 907 Fifteenth Street, N. W., Washington, D. C., attorneys for the Plaintiffs.

By /s/ William L. P. Burke
William L. P. Burke

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UNITED STATES DISTRICT COURT
Southern District of Indiana
Terre Haute Division

(Caption—No. TH55-C-50)

Entry for February 20, 1956
Before the Honorable
Cale J. Holder, Judge.

This cause came before the Court upon the motion of plaintiffs to vacate and set aside or in the alternative to

modify, notice to take depositions of plaintiffs filed by defendant, request for oral argument of plaintiff, defendant's motion to consolidate taking of depositions and to extend time for pleading, plaintiffs' objections to defendant's motion for consolidation of depositions and extension of time for filing responsive pleadings, and motion of the plaintiffs to enlarge the time for taking defendant's deposition, and the Court being fully advised in the premises, now

DENIES plaintiff's request for oral argument, and plaintiffs' motion to vacate and set aside defendant's motion to take depositions filed January 17, 1956, is GRANTED; and defendant's motion to take depositions upon oral examinations is hereby vacated and set aside;

Defendant's motion to consolidate taking of depositions and to extend time for pleading is DENIED as to Specification One (1) and Specification Two (2);

Plaintiffs' request for oral argument is DENIED; and plaintiffs' objections to defendant's motion for consolidation of depositions and request for enlargement of time for defendant to file responsive pleadings is SUSTAINED: AND

Plaintiffs' request for oral argument is denied; and plaintiffs' motion to enlarge the time for taking defendant's deposition is GRANTED and time is enlarged until ten days after both responsive pleadings have been filed and served upon the plaintiffs and the written interrogatories served upon the defendant corporation by its President, Carl F. Kumpf, November 22, 1955, have been answered.

Copy to:
Dewey & Nattkemper, 506 Ohio St., Terre Haute, Indiana
Val J. Mitchell, 907 Fifteenth St., N.W., Wash. D. C.
Harold H. Bacon, 907 Fifteenth St., N.W., Wash. D. C.
William L. P. Burke, 1005 Ambassador Bldg.,
St. Louis, Mo.

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UNITED STATES DISTRICT COURT
For the Southern District of Indiana
Terre Haute Division

(Caption—No. TH55-C-50)
(9/12/56 Overruled CJH)

MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS

(Filed U. S. District Court Apr 24 1956)

Defendants respectfully pray this Honorable Court that the complaint in the above case be dismissed and the judgment on the pleadings herein be entered for the defendants on the grounds that:

1. The complaint fails to state a claim against defendant upon which relief can be granted.

2. The plaintiffs lack the capacity to sue in the above cause.

Defendants request oral argument.

/s/ William L. P. Burke
William L. P. Burke
1005 Ambassador Building
St. Louis, Missouri

John R. Jett
Vigo County Court House
Terre Haute, Indiana
Attorneys for Defendant,
Quality Coal Corporation
Brazil, Indiana

114 MEMORANDUM

I

(Filed Apr 24 1956)

Lewis Et. Al. vs. Jackson And Squire Et. Al., 86 F. Supp., 354, (App., Dismissed On Stipulation 181 F. 2nd 1011) Governs And The Claim Should Be Disinissed And Judgment On The Pleadings Entered.

The above cited case (here and after known as the Jackson-Squire case) was decided in the United States District of Arkansas in 1949. The Trustees of the United Mine Workers Welfare and Retirement Fund, as in the instant case, sued for unpaid moneys allegedly due into the Welfare Fund and, in a well considered opinion, the Court determined that no trust had arisen as to the moneys sued for, because they had never been transferred, nor delivered to the Fund and if the plaintiff Trustees had a cause of action it depended upon the validity of the National Bituminous Coal Wage Agreements of 1947 and 1948. The Court further stated as a matter of law, that the plaintiffs had no standing in Court as Trustees under an executed trust, and pointed out that they would have standing as donee-beneficiaries under the Agreements. In the instant case, the Trustees are suing as such to reduce trust moneys to possession. There is no allegation of contractual rights but rather the allegation is that of trust rights, viz:

Paragraph one of the complaint states that the plaintiffs are Trustees of a "Charitable Trust."

Paragraph three of the complaint states, "The United Mine Workers of America Welfare and Retirement Fund was created by contract dated March 5, 1950." The plaintiff Trustees are proceeding on the theory of reducing trust property to possession. As conclusive proof, the Annual Report of the United Mine Workers of America

Welfare and Retirement Fund for the year ending June 30, 1955 states:

> "In conformity with terms of the Trust Agreement and with Federal Statutes governing Trusts, the Fund is organized and administered as a separate entity, independent of the Union and the coal operators, pursuant to resolutions adopted by the Fund's Trustees who are designated in the Trust Agreement: John L. Lewis, Chairman and Chief Executive Officer, Charles A. Owen and Josephine Roche."

This report is a public document deseminated throughout the United States. Therefore, under the decision of the Jackson-Squire case the complaint should be dismissed and judgment on the pleadings entered herein.

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II.

The Complaint Fails To Comply With Rule One Of The Federal Rules Of Civil Procedure And Should Be Dismissed.

Under the allegations of the complaint suit is brought by plaintiff Trustees to collect sums overdue and unpaid under various Agreements specified in the complaint only as "National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952 and the same Agreement as amended effective September 1, 1955. The plaintiffs further allege that they are Trustees of a Charitable Trust (para. 1, complaint) known as the United Mine Workers Welfare and Retirement Fund. There are no allegations that the plaintiffs are parties privy to the Agreements cited in the complaint. The only interest alleged by plaintiffs is that the defendant agreed to pay the United Mine Workers Welfare Fund the sum of 40¢ per ton on all coal produced for use or sale on or after October 1, 1952. The ambiguity in the complaint is obvious

rendering it impossible for the Defendant to proceed. Are the Trustees asking to reduce trust property to possession or are they proceeding to enforce contractual rights to agreements?

A complaint may proceed on two inconsistent theories entitling plaintiff to different remedies but if the inconsistent allegations and demands are not properly separated, the pleadings are not simple, concise and direct, and they may be dismissed on motion.

Catanzaritte et al., vs. Bianco, 25 F. Supp. 457.

A claim for relief stated in such a manner that it cannot be determined whether it is for fraud or breach of contract or for conversion should be dismissed with leave to amend.

Atwater vs. North American Coal Corporation et al., 11 F. R. 210 appeal dismissed 111 F. 2nd 125.

Of course, if the complaint could conceivably be based upon contractual rights while it obviously is not, it fails to fulfill the requirements of the Federal Rules of Civil Procedure and decisions thereunder.

Performance or occurrence of conditions precedent must, of course, be alleged in some form and failure to do so requires dismissal of the complaint.

Landon vs. Wolverine Hotel Company, 33 F. Supp. 705.

Maguire vs. Federal Corporation, 181 F. Supp. 320.

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III.

The Plaintiffs Lack The Capacity To Sue.

The plaintiff Trustees have no capacity to sue as such Trustees in the instant case. If such a capacity does exist it is in other than their trust capacity. (Jackson-Squire, supra.) The complaint states that the plaintiffs sue as

"John L. Lewis, Charles A. Owen and Josephine Roche, As Trustees of the United Mine Workers of America Welfare and Retirement Fund."

The Jackson Squire case shows that John L. Lewis, Ezra Van Horn and Styles Bridges were Trustees of the above cited fund. There is no allegation in the complaint as to how the present Trustees assumed their capacity. Moreover, the complaint states that the United Mine Workers Welfare and Retirement Fund was created by contract dated March 5, 1950. It is assumed that this refers to the Bituminous Agreement of 1950 and therein we find reference to the "United Mine Workers Welfare and Retirement Fund" of 1950 and the Plaintiffs were designated as Trustees of the fund of 1950. The Defendant Corporation contends that the record shows that the United Mine Workers of America Welfare and Retirement Fund and the United Mine Workers Welfare and Retirement Fund of 1950 are two separate Funds with different Trustees and with different beneficiaries and, therefore, the present plaintiff Trustees have no capacity to sue as Trustees of the United Mine Workers of America Welfare and Retirement Fund. The Jackson-Squire case details the history of the United Mine Workers of America Welfare and Retirement Fund and it is uncontroverted that it was in existence long prior to 1950 and not "created by contract dated March 5, 1950". (para. 3, complaint)

IV

The Complaint Is Based Upon Conclusions Of Law And Should, Therefore, Be Dismissed.

The Plaintiffs based the essential elements of the complaint on two conclusions of law instead of facts. Such conclusions are:

1. "A Charitable Trust". (para. 1 of the complaint)
2. "The United Mine Workers of America Welfare and Retirement Fund as created by contract dated March 5, 1950." (para. 3 of the complaint)

Rule 1, F.R.C.P.

117 For the assigned reasons Defendant Corporation respectfully requests that the case be dismissed and judgment on the Pleadings entered herein.

/s/ William L. P. Burke
William L. P. Burke
1005 Ambassador Building
St. Louis, Missouri
John R. Jett
Vigo County Court House
Terre Haute, Indiana
Attorneys for Defendant,
Quality Coal Corporation
Brazil, Indiana

I hereby certify that a copy of the foregong was mailed to Dewey & Nattkemper, 506 Ohio Street, Terre Haute, Indiana this 24th day of April, 1956.

William L. P. Burke

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UNITED STATES DISTRICT COURT
For the Southern District of Indiana
Terre Haute Division

(Caption—No. TH55-C-50)
(9/12/56 Granted CJH)

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed U. S. District Court May 10, 1956.)

The plaintiffs, John L. Lewis, Charles A. Owen and Josephine Roche, as Trustees of the United Mine Workers

of America Welfare and Retirement Fund, hereby move the Court to enter summary judgment for the plaintiffs on the claim they assert against the defendant, Quality Coal Corporation, in the amount of $41,588.46, plus interest and the costs of this action on the ground that the complaint, answers to the interrogatories and affidavits filed herewith show the plaintiffs are entitled to judgment as a matter of law.

Plaintiffs respectfully request oral argument.

Dewey and Natthemper
506 Ohio Street
Terre Haute, Indiana
By: /s/ Louis D. Natthemper
Louis D. Natthemper
/s/ Val J. Mitch
Val. J. Mitch
907 Fifteenth Street, N. W.
Washington, D. C.
/s/ Harold H. Bacon
Harold H. Bacon
907 Fifteenth Street, N. W.
Washington, D. C.
Attorneys for Plaintiffs

120 SERVICE

State of Indiana }
Vigo County } ss.

Louis D. Natthemper, being duly sworn, deposes and says:

He is one of the attorneys of record for the plaintiffs in the above entitled cause and makes this proof of service for and in the behalf of said plaintiffs.

Affiant further says that on May 10, 1956 he mailed John R. Jett, Vigo County Court House, Terre Haute, Indiana, the attorney of record for defendant, a correct

copy of the above and foregoing Motion for Summary Judgment and Request for Oral Argument.

/s/ Louis D. Natthemper
Louis D. Natthemper

Subscribed and Sworn to before me, this 10th day of May, 1956.

/s/ Jennie Willis
Notary Public

My commission expires
Jan. 3, 1957
(Seal)

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UNITED STATES DISTRICT COURT
For the Southern District of Indiana
Terre Haute Division

(Filed U. S. District Court May 10 1956)

• • (Caption—No. TH55-C-50) • •

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS, AND IN THE ALTERNATIVE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

STATEMENT OF FACTS

The facts of this case may be briefly summarized for the Court as follows: On October 31, 1955, the plaintiffs, the Trustees of the United Mine Workers of America Welfare and Retirement Fund, filed a complaint against the Quality Coal Corporation of Brazil, Indiana, which complaint was served on the defendant corporation, November 11, 1955. After filing the complaint the plaintiffs filed interrogatories directed to the defendant corporation.

On December 12, 1955, the parties entered into a stipulation with the approval and order of the Court allowing the defendant corporation until January 16, 1956, to answer the complaint and answer the interrogatories. On January 17, 1956, the defendant corporation filed with the Court notice to take the depositions of the plaintiffs in Brazil, Indiana, on February 1, 1956, and to extend the time for filing responsive pleadings until 10 days after taking the depositions of the plaintiffs. On February 20, 1956, this Court entered an order granting plaintiffs' motion to vacate and set aside defendant's notice of 123 depositions served on the plaintiffs. On January 23, 1956, defendant served upon the plaintiffs answers to the interrogatories previously propounded, however, the defendant did not and has not served upon plaintiffs an answer to the complaint due to be filed according to stipulation and order of this Court, January 16, 1956. Plaintiffs filed with the Court, February 1, 1956, a motion for default judgment on the grounds that defendant had not filed an answer to the complaint, and subsequently filed an amendment to that motion specifically requesting a default judgment in the amount of $41,588.46, which sum was computed on the basis of the answers to the interrogatories filed by the defendant. At this writing the Court has not ruled on the plaintiffs' motion for default judgment. The defendant on April 24, 1956, mailed to plaintiffs a motion to dismiss and for judgment on the pleadings. This motion, in the alternative, is based on the grounds that the complaint fails to state a claim upon which relief can be granted and that the plaintiffs lack the capacity to sue in this action. Plaintiffs, while continuing to urge the Court to grant their motion for default judgment, now also urge the Court to deny defendant's motion to dismiss and for judgment on the pleadings and in the alternative to grant plaintiffs summary judgment for the reasons hereinafter set forth.

ARGUMENT I.

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS IS PREMATURE.

The defendant by its motion for judgment on the pleadings has moved prematurely in that judgment on the pleadings may only be entertained by the Court after the pleadings have been closed. The only pleading before the Court at the present time is the complaint filed by the plaintiffs. The defendant has not filed a responsive pleading by way of answer to the complaint even though under order of this Court, dated December 14, 1955, defendant's answer was due to be filed on January 16, 1956. Rule 12(c) of the Federal Rules of Civil Procedure pro-
124 vides that:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for a judgment on the pleadings. (Underscoring supplied.)

Rule 7(a) of the Federal Rules of Civil Procedure provides as follows:

> There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

Under the provisions of Rule 7(a) it is obvious that the pleadings are not closed until an answer has been filed, except in those cases where counterclaims or cross-claims are involved in which cases the pleadings remain open until answers to the counterclaims or cross-claims are filed.

In Edelman v. Locker, (D.C. E.D. Pa.), 6 F.R.D. 272, 274, the court held:

> Rule 12(c) provides: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings". Rule 7(a) provides, inter alia: "There shall be a complaint and an answer; and there shall be a reply, if the answer contains a counterclaim denominated as such; * * *". Under Rule 7(a) where the answer contains a counterclaim denominated as such, a reply by the plaintiff is mandatory, and, until the reply is filed, the pleadings are not closed. See United States v. Hole, D.C. Mont., 38 F. Supp. 600.
>
> It thus appears that under the provision of Rule 12 (c), plaintiff's motion for judgment on the pleadings is premature and should not be considered at this time. Defendant's answer includes a counterclaim denominated as such to which plaintiff has filed no reply. Until the reply is filed, the pleadings are not closed and plaintiff cannot invoke the provisions of Rule 12(c). Of course, plaintiff filed a simultaneous motion to dismiss the counterclaim which, if successful, would have cured this defect. The motion to dismiss, however, has been denied and the pleadings are therefore not at an end.

It is clear then from the unambiguous language of
125 the Rules that the motion for judgment on the pleadings may not be entertained until such time as the pleadings are closed, and the defendant in this case has failed to file an answer closing the pleadings. Plaintiffs urge that there is no alternative but to deny the motion for judgment on the pleadings for the reason that it is premature.

ARGUMENT II.

THE COMPLAINT STATES A CLAIM AGAINST THE DEFENDANT UPON WHICH RELIEF CAN BE GRANTED.

The defendant repeatedly urges by its motion that plaintiffs' complaint should be dismissed for failure to state a cause of action upon which relief could be granted. The Court's attention is called to the case of Kingwood Oil Co. v. Bell, (CA 7th), 204 F.2d 8, 12-13, wherein the court stated:

> The amended complaint herein should not have been dismissed unless it appeared to a certainty that plaintiff would not be entitled to any relief under any state of facts which could be proved in support of its claims. No matter how likely it may seem that a plaintiff may be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to prove it. Peterson Steels, Inc. v. Seidmon, 7 Cir., 188 F.2d 193, 195; Kirke v. Texas Co., 7 Cir., 186 F.2d 643, 647; Chicago & N. W. R. Co. v. Chicago Packaged Fuel Co., 7 Cir., 183 F.2d 630; Carroll v. Morrison Hotel Corp., 7 Cir., 149 F.2d 404, 406. In Publicity Building Realty Corp. v. Hannegan, 8 Cir., 139 F.2d 583, the court said at pages 586-587: "The Federal Rules of Civil Procedure (28 U.S.C.A.) do not sanction the disposition of doubtful issues of fact or law upon motions to dismiss for insufficiency of pleadings".

It is obvious from the repeated consistent holdings of the United States Court of Appeals for the Seventh Circuit that a complaint should not be dismissed unless it appears that the plaintiff could not prove he was entitled to relief under any set of facts as alleged. Rule 8(a) (2) of the Rules provides that a complaint shall contain:

a short and plain statement of the claim showing that the pleader is entitled to relief, * * *.

The complaint filed in this action contains the following allegations:

126 (1) That the plaintiffs are Trustees of the United Mine Workers of America Welfare and Retirement Fund.

(2) That the amount in controversy exceeds Three Thousand Dollars ($3,000.00).

(3) That the United Mine Workers of America Welfare and Retirement Fund was created by contract dated March 5, 1950.

(4) That the defendant corporation signed the National Bituminous Coal Wage Agreement of 1950 and the amendments thereto of 1952 and 1955.

(5) That under the terms of the 1950 agreement as amended, the defendant corporation agreed to pay to the United Mine Workers of America Welfare and Retirement Fund the sum of forty cents (40¢) per ton on all coal produced for use or sale after October 1, 1952.

(6) That after October 1, 1952, the defendant corporation produced coal and failed to pay to the fund the sum of forty cents (40¢) per ton on a portion of the coal so produced and, therefore, is indebted to the plaintiff Trustees in the amount of $46,754.40.

Plaintiffs urge that this complaint has been drawn in compliance with the spirit and intent of Rule 8(a) and without doubt sets forth a cause of action upon which relief may be granted. One of the tests used to determine whether or not a complaint has been properly drawn under Rule 8(a) is whether or not the defendant upon examining the complaint has sufficient knowledge of the

charge brought to answer in the affirmative or negative to each allegation. On the grounds raised in the brief in support of defendant's motion it is obvious that defendant understands the basis of plaintiffs' complaint. If the complaint had not been so worded so as to contain enough detail for defendant's complete understanding, defendant could have filed a motion for a more definite statement.

Rule 12(e) provides that where a complaint is vague
127 or ambiguous, the party upon whom it is served may file a motion for a more definite statement so that a responsive pleading may be framed. A complaint should not be dismissed on the vague grounds alleged here by the defendant but only when it appears with certainty that plaintiffs would not be entitled to any relief under any state of facts which could be proved in support of its claims. Kingwood Oil Co. v. Bell, supra.

Throughout defendant's brief in support of its motion great stress and emphasis is laid on the case of Lewis v. Jackson & Squire, (D.C. W.D. Ark.) 86 F.Supp. 354. This case is not applicable in this action for several reasons. A brief reading of the opinion will disclose that this case was decided on the basis of the terminology of the Nation Bituminous Coal Wage Agreements of 1947 and 1948 and concerned the United Mine Workers of America Welfare and Retirement Fund of 1947. Neither the contracts of 1947 and 1948, nor the 1947 Fund are here involved.

ARGUMENT III.

PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT AS PROVIDED BY RULE 56(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Plaintiffs respectfully urge this Court to grant them summary judgment against the defendant in the amount of $41,588.46, plus interest from September 30, 1955, and the costs of this action. While plaintiffs now move this

Court for summary judgment, it is not intended to be a waiver of their motion for default judgment previously filed and to which they feel they are entitled by reason of defendant's failure to file an answer to the complaint, which answer is long overdue. Rule 56(a) of the Federal Rules of Civil Procedure reads in part as follows:

> A party seeking to recover upon a claim, * * * may, at any time after the expiration of twenty days from the commencement of the action or after service of a
128 motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

Rule 56 as originally drawn did not provide for plaintiffs moving for summary judgment until after answer had been served. Subsequently, it was determined that this procedure allowed the defendant to take advantage of dilatory tactics and delay filing the disposition of a case that well could be concluded by motion for summary judgment. The dissenting opinion of Judge Clark in the United States v. Adlers Creamery (CA 2d), 107 F.2d 987, 992, encouraged the amendment of Rule 56 to its present language permitting plaintiff to file motion for summary judgment prior to answer.

The court in Stuart Inv. Co. v. Westinghouse Electric Corp., (D.C. Neb.) 11 F.R.D. 277, 280, confirms plaintiffs' position that a motion for summary judgment prior to answer is applicable in this case as follows:

> On this occasion, the plaintiff demands a summary judgment in its favor before any answer has been filed. It is true that Rule 56 in its present form allows the presentation by a claimant of such a motion, "at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party".

> In its original language the rule allowed the making of such a motion only after the pleading in answer to the claim had been served. But although a motion by a claimant for summary judgment, served before the service of answer to his complaint may not be denied on the ground that it is necessarily and inevitably tendered too early, the general cautions against the allowance of such motions mentioned in the preceding paragraph must be kept in view. And within their teaching, a court must not grant a summary judgment upon motion therefor tendered before the service of an answer, unless in the situation presented, it appears to a certainty that no answer which the adverse party might properly serve could present a genuine issue of fact. (Underscoring supplied.)

The Court's attention is called to the conclusion reached in the Stuart Inv. Co. case that a summary judgment tendered before service of answer is proper in a situation where it "appears to a certainty that no answer which the adverse party might properly serve could present a genuine issue of fact". The defendant in this case has failed to file an answer to the complaint although service
129 of the complaint was had on November 11, 1955, and by stipulation of the parties and order of this Court answer was required on January 16, 1956. Plaintiffs urge that if the defendant had a defense in law or in fact, an answer would have been filed within the period of the stipulation and as ordered by this Court. It is "to a certainty" that defendant does not have a defense or it would have been presented by answer. The only defense set forth in the record at this time is by way of motion to dismiss and for judgment on the pleadings which create defenses as a matter of law, which have hereinbefore been discussed.

ARGUMENT IV.

THE COMPLAINT, DEFENDANT'S ANSWERS TO INTERROGATORIES AND ATTACHED AFFIDAVITS SHOW CONCLUSIVELY NO ISSUE OF MATERIAL FACT REMAINS.

In support of plaintiffs' motion for summary judgment, an examination of the complaint, answers to the interrogatories propounded to the defendant corporation and the affidavits attached hereto show conclusively that the plaintiffs are entitled to summary judgment as requested.

Paragraph I of the complaint sets forth that the plaintiffs are Trustees of the United Mine Workers of America Welfare and Retirement Fund. The affidavit of Director-Trustee, Josephine Roche, (attached hereto as plaintiffs' Exhibit A) supports this allegation and the allegation of citizenship of the Trustees giving this Court jurisdiction on the grounds of diversity of citizenship. The answers to Interrogatories Nos. 1, 2 and 3 establish that the defendant corporation has offices in Brazil, Indiana, and was organized for the purpose of mining coal and clay. The answer to Interrogatory No. 4 establishes that the mining operations of the defendant corporation were carried on in Clay County, Indiana.

Paragraph II of the complaint alleges jurisdictional amount in excess of $3,000.00, which will be established later on the basis of the answers to the interrogatories
130 propounded to the defend orporation.

Paragraph III of the complaint alleges that the United Mine Workers of America Welfare and Retirement Fund was created by contract dated March 5, 1950. In support of this allegation there is attached hereto the affidavit of Harold H. Bacon, Assistant to the Counsel to the Trustees, (plaintiffs' Exhibit B), setting forth that the National Bituminous Coal Wage Agreement of 1950 and the amendments thereto of September 29, 1952, and Sep-

tember 1, 1955, (attached thereto and hereinafter referred to as the contracts of 1950, 1952 and 1955, respectively), are true and accurate reproductions of the original contracts as executed by the defendant.

Paragraph IV of the complaint alleges that between October, 1952, and September 30, 1955, the defendant was engaged in the business of operating coal mines in Clay County, Indiana. This allegation is supported by the answers to Interrogatories Nos. 1, 2, 3 and 4 propounded to the defendant corporation. Paragraph IV further alleges that the defendnt corporation signed the National Bituminous Coal Wage Agreement of 1950 and the amendments thereto of 1952 and 1955, (attached hereto as a part of Exhibit B), the terms of which provide that during the period herein involved, September 1, 1953, through and including September 30, 1955, defendant corporation was obligated to pay into the United Mine Workers of America Welfare and Retirement Fund the sum of forty cents (40¢) per ton on all coal produced for use or sale. In addition, the answer to Interrogatory No. 11 admits that the defendant corporation executed the National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952, on or about September 29, 1952, and executed the amendment of September 1, 1955, on or about September 1, 1955.

Paragraph V of the complaint alleges that between September 1, 1953, and September 30, 1955, defendant corporation produced approximately 116,886 tons of coal for use or sale. In answer to Interrogatory No. 8 defendant corporation admits that during this period the defendant corporation produced 120,969.48 tons, which is the tonnage upon which plaintiffs now request summary judg-
131 ment, rather than the 116,886 tons as alleged in the complaint. Paragraph V of the complaint further alleges that for this period defendant corporation paid

royalty due and owing to the plaintiffs in the amount of $6,799.33, which is admitted by answer to Interrogatory No. 9 propounded to the defendant corporation. The amount of the summary judgment requested by the plaintiffs, $41,588.46, is arrived at by a simple mathematical computation as follows: multiplying 120,969.48 tons of coal by the royalty due thereon of forty cents (40¢) per ton gives a total debt due and owing of $48,387.79, less payments in the amount of $6,799.33, leaving a balance due and owing for which summary judgment is urged in the amount of $41,588.46. The answer to Interrogatory No. 9 further admits that this sum was not paid.

In view of the uncontroverted allegations of the complaint, supported by affidavits and answers to interrogatories propounded to the defendant corporation, plaintiffs urge that there remains no material issue of fact to be determined.

ARGUMENT V.

THE FUND IS A CHARITABLE TRUST.

The United Mine Workers of America Welfare and Retirement Fund was created by the provisions of the National Bituminous Coal Wage Agreement of 1950, (Exhibit B-1), page 3, paragraph A, wherein it is stated:

> It is hereby stipulated and agreed by the contracting parties hereto that there is hereby created a Fund to be designated and known as the "United Mine Workers of America Welfare and Retirement Fund of 1950".

The plaintiffs, John L. Lewis, Charles A. Owen and Josephine Roche, are Trustees of the Fund and citizens of the States of Illinois, Florida and Colorado, respectively. There is attached and made an exhibit to this motion the affidavit of Josephine Roche, (Exhibit A), which states and affirms that John L. Lewis, Charles A.

Owen and Josephine Roche are Trustees of the Fund and citizens of the States of Illinois, Florida and Colorado, respectively.

132 In addition, the contract of 1950, (Exhibit B-1), states on page 3, paragraph A, as follows:

> The Operators signatory hereto do hereby appoint Charles A. Owen, of New York City, as their representative on said Board of Trustees. The United Mine Workers of America do hereby appoint John L. Lewis, of Washington, D. C., as its representative on said Board of Trustees. It is further stipulated and agreed by the joint contracting parties that Josephine Roche, of Denver, Colorado, is appointed as the neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Fund herein created.

The Fund was created under the authority and the provisions of the Labor-Management Relations Act, 1947, Title 29, U.S.C.A., Section 186. Defendant by its motions has raised the question as to whether the Fund is a charitable trust. There is no doubt, from a reading of the authorities and case law, but that the Fund does constitute and is a charitable trust. Prior to the existence of the Fund of 1950, the National Bituminous Coal Wage Agreement of 1947 created the United Mine Workers of America Welfare and Retirement Fund of 1947, which was subsequently absorbed into the Fund of 1950. At the inception of the 1947 Fund, a dispute arose between the Trustees concerning certain policy matters in the operation of the Fund. One of the Trustees, Ezra Van Horn, filed suit in the United States District Court for the District of Columbia, and one of the questions determined by the court in that suit is whether or not there had to be a unanimity of the Trustees before the Resolutions of the Trustees were effected. That court held that inasmuch as the Fund

was a charitable trust, it was not necessary that the Trustees' action be unanimous but that a majority rule of the Trustees would govern the actions of the Fund. So, at the outset of the operation of the Fund it was declared by Judge Goldsborough in Van Horn v. Lewis 79 F.Supp. 541, that the Fund was a charitable trust and was to be governed by rules applicable to charitable trusts.

The fact that beneficiaries of a trust are to be selected from a special class does not affect its character as a public trust unless the class is so small that it has no
133 benefit to a community. The case of Eagan v. Commissioner of Internal Revenue, (C.A. 5th), 43 F.2d 881, involved the creation of a trust fund somewhat analogous to the United Mine Workers of America Welfare and Retirement Fund, in that the benefits of a trust were payable to the employees of a single company. In ruling the trust to be exclusively charitable, it was stated at p. 884:

> Each of these three purposes is clearly charitable in the colloquial sense. An income less than a living wage certainly implies the existence of need. Provision for the widow and orphans of a working man is charity. Assistance to the unemployed is now rendered by many government as a public duty. That the beneficiaries are limited to the employees for the time being of a single company does not so restrict the charity as to defeat it in the legal sense. Mr. Eagan's estate having parted with all his stock, there was no selfish interest to be served. The gift not being to particular individuals, but to a shifting class, is not a mere private bounty. The employees of the company at the time of testator's death number 1,470 and they and their dependents numbered about 6,000 persons, and so constituted a considerable portion of the

public. A trust for their relief in the ways specified meets the general tests for a public charity in the legal sense. (Underscoring supplied.)

The Court is asked to take judicial notice of the fact that the number of coal miners covered by the National Bituminous Coal Wage Agreements and the various beneficiaries or dependents of those coal miners are of a substantially large number to constitute a considerable portion of the citizens of the various states and of the United States.

Again in Harrison v. Barker Annuity Fund, (C.A. 7th) 90 F.2d 286, the court had before it a fund somewhat analogous to the United Mine Workers of America Welfare and Retirement Fund. At page 288 the court said:

> Accordingly the courts quite generally have extended liberal construction to statutes furthering the encouragement of bequests for purposes which tend toward the public good, without reference to personal or selfish motives. Thus, in Mutual Aid & Benefit Association v. Commissioner, (C.C.A.) 42 F.(2d) 619, where a manufacturer of textiles organized a non-profit corporation for the purpose of carrying on welfare work amongst its employees and to pay medical, dental, sick and death benefits, it was held that the association was exempt [from Federal taxes as a tax exempt corporation, a charitable corporation] 134 even though the existence and operation of such a corporation constituted a direct benefit to the manufacturing corporation.

Further, at page 289, 290, the court said:

> It is urged that the fact that it is possible to determine who the annuitants were as a designated class defeats the exemption. Some courts and legal writers have believed that indefiniteness is essential to a

public charity. Upon examination of the cases, it is apparent such lack of indefiniteness is one of degree, and in most instances of so designated uncertainty, it was possible to ascertain the definite class. Indeed, it is difficult to conceive how a trust fund can be distributed to an indefinite class; the distributor must always determine the members of the qualified class. In Pease v. Pattison, 32 Ch.Div. 154 the sum was devoted to "those injured and the families of those killed" in a mine disaster. The designation was, in a sense, indefinite. The qualified members of class had to be ascertained before distribution could be made. Here the specific individuals who were entitled to receive the benefits were not known. True, their names could be ascertained by an investigation, but the fact that the necessary investigation might be less arduous than in other cases does not necessarily destroy the exemption. In the language of 2 Bogert, Trusts and Trustees, par. 362, p. 1093: "Lastly, a trust may have as its object the improvement of the condition of a definite group of known individuals in a mental, moral or physical way. Here the cestuis are from the beginning fixed and identifiable and are always to be such. There is to be no addition to the class. For example, a public subscription may be taken for the victims of a certain flood, fire or tornado. Here the persons who suffered physical injury or lost property as a result of this event may well be easily discoverable. In a short time the trustees of the fund could learn the names and addresses of all the members of the class. The benefits to be conferred are of the type which usually validate charitable trusts; that is, they involve the relief of sickness, injury, and poverty. Shall the fact that these benefits are to go to definite persons make the trust private? It would seem here that each court

should decide for itself whether the size of the class to be aided is such that there is a general public interest in the carrying out of the trust, or whether the relief is so limited in amount as to make it solely a matter of the interest of the individual sufferers." (Underscoring supplied.)

The stated purposes of the Fund as enumerated in the National Bituminous Coal Wage Agreement of 1950 are as follows:

> Said purposes shall be to make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or ill-
> 135 ness resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise compensated for at all or adequately by tax supported agencies created by federal or State law; (3) benefits on account of sickness, temporary disability, permanent disability, death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302 (c) of the "Labor-Management Relations Act, 1947", as agreed upon from time to time by the Trustees including the making of any or all of the foregoing benefits applicable to the individual members of the United Mine Workers of America and their families and dependents, and to employees of the Operators other than those exempted from this Agreement; and (5) benefits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the aforesaid "Labor-Management Relations Act, 1947".

It is obvious from the language of the 1950 contract creating the Fund, that the Fund was created for the relief of sickness, injury and poverty of coal miners and their families, and that the Fund meets the tests required of a charitable trust. Its object is to provide medical assistance and old age pensions to a large segment of the American public, the coal miners and their families, who as a group have frequently become, through economic struggles, the pitiful objects of inadequate public charity. The mere fact that some benefits might flow to the coal operators, the settlors of this Fund, in that they might have more helpful and content employees, is of no consequence, since it is only an incidental benefit flowing from the true intent of the creators of this Fund that the minimum necessities of life be made available for the miner and his family.

The courts in the State of Indiana have taken a broad view in determining whether a certain act is charitable. In Quinn v. Peoples Trust & Son, Co., 223 Ind. 317, 60 N.E. 2d 281, 157 ALR 885, the court held:

> The true test of a public charitable trust is the object sought to be attained and not the motive of the donor. Restatement of Law of Trusts, sec. 368 d, p. 1142; Scobey v. Beckman, (1942), 111 Ind. App. 574, 580, 41 N.E. 2d 847.

The court further said:

136 The courts of this state have often held that gifts to charitable uses are favored and are to be construed by the most liberal rules that the nature of each case, as presented, will permit, rather than that the gift should fail and the charitable purposes of the donors be not accomplished. Richards v. Wilson, (1916), 185 Ind. 335, 392, 112 N.E. 780; Crawfordsville Trust Co. v. Elston Bank & Trust Co., (1939), 216 Ind. 596, 25 N.E. 2d 626.

ARGUMENT VI.

A VALID TRUST IS CREATED EVEN THOUGH THE TRUST RES IS NOT IN EXISTENCE IF CREATED BY CONTRACT SUPPORTED BY CONSIDERATION AND THE RES SUBSEQUENTLY COMES INTO BEING.

It is basic trust law that a valid existing trust must be based upon an existing property interest. However, if a trust is based upon an expectancy, it is created and may be enforceable upon the happening of the future event. The enforceability of such a trust is based upon contract law. Therefore, should the terms of a valid contract provide for one party to transfer a res, to be acquired or determined in the future, to a trustee, a trust is imposed and the trustee may enforce the transfer to the trust when the res is acquired or determinable by the settlor. The key to enforcing the transfer of the res to the trust is a valid contract, based on valuable consideration, providing for the creation of the trust. In Ransdel v. Moore, 153 Ind. 393, p. 403, the court affirmed the position now taken by the plaintiffs as follows:

> It is true that when there is no sufficient consideration and the trust is executory, that a voluntary settlor cannot be compelled to complete the trust, but when there is sufficient consideration he may be compelled to do so. 1 Perry on Trusts, Secs. 95, 96, 97; Gaylord v. City of Lafayette, supra. [(115 Ind. 423, 426)]

The defendant has obligated itself under the contract not only to transfer the trust res to the plaintiffs when it came into existence but has by contract agreed that title to the trust res yet unpaid shall be in the trustee plaintiffs. The 1950 contract (Exhibit B-1) reads (p. 4):

137a Title to all monies paid into and or due and owing

> said Fund shall be vested in and remain exclusively in the Trustees of the Fund, * * *. (Underscoring supplied.)

Therefore, when the defendant produced coal for use or sale, the future and perhaps uncertain expectancy at the time of the execution of the contract became a reality. The res of the trust was no longer an expectancy, but an existing res. The obligation of the defendant to pay to the plaintiffs the royalty provided by the terms of the contracts is well founded. Obviously, until the defendant produced coal for use or sale there was no obligation under trust or contract law for the payment of royalty. However, once the coal was produced for use or sale, the res being in existence, the obligation became current, and the title to the res became fixed in the Trustees. The plaintiffs' action, therefore, is simply to reduce to possession trust property in the hands of the defendant, title to which is in the plaintiffs.

The authorities are consistent in their opinions that the obligation to create a future trust and to transfer the trust res to the trust is contractual. In the Restatement of Law of Trusts, Sec. 86 (b), p. 245, it is stated:

> Although a person who has a mere expectancy has no interest of which he can create a trust, yet he can bind himself by a contract to create a trust or otherwise to dispose of the property if and when he should thereafter acquire it. An agreement by him to create a trust of the property is not binding as a contract unless he receives a fair consideration therefor. If he receives a fair consideration, he is liable as upon a contract to create a trust, and the contract is ordinarily specifically enforceable if and when he acquires the property. This is true even though his agreement is not in the form of a promise to create a trust in the future, but is in the form of a present declaration

of trust of the property which he hopes to acquire in the future, or in the form of present conveyance in trust of property which he hopes to acquire in the future. The mere fact that he purports to create a trust of the property before he acquires it does not preclude a court of equity from enforcing the contract or from compelling him to make a transfer in trust when he subsequently acquires the property, provided that he received fair consideration. (Underscoring supplied.)

See also Bogert on Trusts, Vol. I, Sec. 112, p. 507.

138 In addition to concurring with the aforesaid authorities that a future trust may be created by contract and enforceable as such, in Scott on Trusts, Vol. I, Sec. 86, p. 460, the author discusses the questions as to whether a future trust is created automatically upon acquisition by the settlor of the res which he has contracted to hold in trust and transfer to the trustee.

Where a person purports to create a present trust of property to be acquired in the future, the transaction may be considered as in effect a promise to create a trust when the property is acquired. We have seen that such a promise is not binding as a contract unless consideration is given for the promise or unless the promise is made in an instrument under seal in jurisdictions in which the effect of a seal has not been changed by statute. Even in jurisdictions in which a contract under seal is binding it is not specifically enforceable if gratuitous. Moreover, if a person purports to create a present trust of property which he does not own, the ineffective conveyance will not be treated as a promise to convey if no consideration is given even though the conveyance is under seal. If consideration is given for the assignment in trust or

declaration of trust, the transaction will be treated as a contract, even though it is not worded as a promise but as a present transfer or declaration of trust. Such a contract, if made for fair consideration, is specifically enforceable in equity when the property is acquired. The courts sometimes speak as though a trust is created at the time of the assignment or declaration of trust, and say that the assignment is valid in equity. What is really meant, it is believed, is that there is a contract which equity will specifically enforce when the property is acquired. If, indeed, there is a binding promise to transfer after-acquired property to another as trustee, a trust may be immediately created not of the after-acquired property, but of the rights arising from the contract; that is to say the trustee may immediately become trustee of the rights created in him by the promise. There is no trust of the property itself, however, at least until it is acquired by the settlor.

Although it is clear that no trust is created before the property is acquired by the settlor, there is a further question whether a trust automatically arises when the property is acquired. No doubt a trust arises if after the settlor acquires the property he then manifests an intention to declare himself trustee of the property or then transfers it to another as trustee. Suppose, however, that there is no further manifestation of intention by the settlor to create a trust. Is his manifestation of intention made before the property was acquired sufficient to cause the trust to arise automatically as soon as it is acquired? If consideration was received by the settlor it is clear that at least there is a valid contract for breach of which he would be liable if he refused to perform his promise. It would seem also that ordinarily at least the remedy at

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law is not adequate, and he could be compelled in equity specifically to perform his promise. This is true whether his promise was to hold the property in trust when acquired, or to transfer it to another as trustee. (Underscoring supplied.)

In Merritt Oil Corporation v. Young, (C.C.A. 10th), 43 F.2d 27, pp. 27, 29, the court held that a trust automatically attached to property when received under a contract providing that the person receiving such property was to retain it for the benefit of another:

1. Appellant contends that no trust was impressed upon the title acquired by Humphreys and Whiteside when the relocations were made by them in July, 1915; that the contract of July 9, 1915, imposed upon them only an obligation to transfer to appellees a two-thirds interest. The appellees contend that a trust attached to such relocations when made. The appellees are clearly right. Humphreys and Whiteside acquired their title by virtue of the original locations of appellees; the relocations were made "in order to further safeguard the respective interest" of appellees and Humphreys and Whiteside. Before the relocations, Humphreys and Whiteside had agreed in writing that, when and if title was acquired by relocations, they would transfer a two-thirds interest to appellees. The contract declared it to be the "purpose and intent to the agreement" that appellees were to have an undivided two-thirds interest in any such relocations. When a title is acquired by means of a promise to hold it for a specified purpose, such as to convey to another, a trust attaches upon the acquisition. Pomeroy's Spec. Perf. of Contract (3d Ed.) 1926, § 144; 26 R.C.L. 1238; Peeler v. Lathrop, (1 C.C.A.), 48 F. 780, * * *.

In Universal Ins. Co. v. Steinbach, (C.A. 9th), 170 F. 2d 303, p. 305, the court held that a trust was created automatically upon receipt of property by reason of an oral agreement under which the beneficial interest in the property was to pass to others when the property was acquired:

> The Steinbach Brothers had no interest in the dredge when the initial "family agreement" was made, and no interest passed at that time, but the agreement furnished a circumstance which allowed the imposition of a trust on the property when the "transferors" (Steinbach Brothers) later obtained an interest therein. (Merritt Oil Corporation v. Young, 10 Cir., 43 F. 2d 27. The subsequent acknowledgment of the prior "family agreement" passed the interest to ap-
> 140 pellees. Scott on Trusts, § 26.5, p. 169; see § 26 comment K. of Restatement of Trusts. The prior oral agreement was acknowledged when the insurance policy was taken out. We hold it to be a sufficient recognition to pass the beneficial interest to the wives. It is immaterial that express words of trust were not used; such are not necessary to create the trust, so long as the intent is manifest. Allen v. Hendrick, 104 Or. 202, 227, 206, p. 733.

The courts and the authorities thus agree that an executory trust supported by consideration is enforceable when the trust res is acquired by the settlor, and at the same time the trust automatically is created. This is particularly true here, where the settlor by contract passed title to the trust res to the plaintiffs when payment of the royalty, the trust res, became due and owing.

CONCLUSION.

Plaintiffs urge that defendant's motions for Judgment on the Pleadings and/or to Dismiss be denied, and that in the alternative that plaintiffs be granted Summary Judgment in the sum of $41,588.46.

Dewey and Nattkemper
506 Ohio Street
Terre Haute, Indiana
By: Louis D. Nattkemper

Val J. Mitch
907 Fifteenth Street, N. W.
Washington, D. C.

Harold H. Bacon
907 Fifteenth Street, N. W.
Washington, D. C.
Attorneys for Plaintiffs

John L. Lewis, Charles A. Owen and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund

141 **EXHIBIT A**

UNITED STATES DISTRICT COURT
For the Southern District of Indiana
Terre Haute Division

John L. Lewis, Charles A. Owen, and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund, Plaintiffs, v. Quality Coal Corporation, A Corporation Defendant.	Civil Action No. TH55-C-50

AFFIDAVIT OF JOSEPHINE ROCHE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

City of Washington
District of Columbia } ss.

Josephine Roche, of the State of Colorado, being duly sworn, deposes and says:

1. That she is the Director and one of the Trustees of the United Mine Workers of America Welfare and Retirement Fund of 907 Fifteenth Street, Northwest, in Washington of the District of Columbia.

2. That she is and has been a citizen of the State of Colorado since March 5, 1950.

3. That Charles A. Owens is one of the Trustees of the United Mine Workers of America Welfare and Retirement Fund of 907 Fifteenth Street, Northwest, in Washington of the District of Columbia.

4. That Charles A. Owens is and has been a citizen of the State of Florida since March 5, 1950.

142 5. That John L. Lewis is one of the Trustees of the United Mine Workers of America Welfare and

Retirement Fund of 907 Fifteenth Street, Northwest, in Washington of the District of Columbia.

6. That John L. Lewis is and has been a citizen of the State of Illinois since March 5, 1950.

/s/ Josephine Roche
Josephine Roche, Director and Trustee
United Mine Workers of America
Welfare and Retirement Fund

Subscribed and sworn to this 8th day of May, 1956, as witness my hand and seal.

/s/ Sara E. Carey
Notary Public

My Commission Expires April 14, 1961
(Seal)

143 EXHIBIT B

UNITED STATES DISTRICT COURT
For the Southern District of Indiana
Terre Haute Division

John L. Lewis, Charles A. Owen, and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund, Plaintiffs, v. Quality Coal Corporation, A Corporation Defendant.	Civil Action No. TH55-C-50

AFFIDAVIT OF HAROLD H. BACON IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Harold H. Bacon, of the State of Maryland, being duly sworn, deposes and says:

1. That he is the Assistant to the Counsel to the Trustees of the United Mine Workers of America Welfare and Retirement Fund of 907 Fifteenth Street, Northwest, in Washington of the District of Columbia.

2. That there is attached hereto and made a part of this Affidavit photostatic reproductions of the National Bituminous Coal Wage Agreement of 1950 (Exhibit B-1), the National Bituminous Coal Wage Agreement as amended September 29, 1952 (Exhibit B-2) and the National Bituminous Coal Wage Agreement as amended September 1, 1955 (Exhibit B-3).

3. That he has examined the original copy of each of the Contracts referred to in paragraph 2 of this Affidavit and compared them with the photostatic reproductions attached hereto as Exhibits B-1, B-2 and B-3, and has found the photostatic copies to be true and correct reproductions of the original Contracts.

/s/ Harold H. Bacon
Harold H. Bacon
Assistant to the Counsel to the
Trustees, United Mine Workers of
America Welfare and Retirement Fund.

144 Subscribed and sworn to this 8th day of May, 1956, as witness my hand and seal.

/s/ Sara E. Carey
Notary Public

My Commission Expires April 14, 1961
(Seal)

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UNITED STATES DISTRICT COURT
Southern District of Indiana
Terre Haute Division

(Caption—No. TH56-C-50)

Entry for September 12, 1956
Before the Honorable
Cale J. Holder, Judge.

William Burke, attorney at Clayton, Missouri, admitted and sworn upon motion of John R. Jett.

Harold H. Bacon, attorney at Washington, D. C., admitted and sworn upon motion of Louis Nattkemper.

This cause came on for hearing upon the plaintiff's motion for summary judgment filed May 10, 1956, defendant's motion to dismiss filed April 24, 1956 and for judgment on the pleadings; plaintiffs' amended motion for default judgment filed April 19, 1956 and plaintiffs' motion for default judgment filed February 21, 1956, the plaintiffs appear by Louis Nattkemper, Val J. Mitch and Harold H. Bacon, and defendant appears by William Burke and John R. Jett.

Counsel for defendant explained to the Court that the delay in preparing and filing it's motion to dismiss of April 24, 1956, was due to his need for the time from the filing of the complaint to acquaint himself with the issues of the law suit and for discovery procedure and he orally moved that the defendant not be defaulted and that the Court consider the defendant's motion for dismissal of the plaintiffs' complaint and for judgment on the pleadings. The oral motion was granted with the understanding that it would not prejudice the consideration of the plaintiffs' motion for summary judgment set for hearing on this date.

The Court having heard arguments of counsel and being fully advised in the premises, now counsel for defendant orally moves the Court for leave to withdraw the motion for judgment on the pleadings and proceed on the motion to dismiss, which oral motion is granted and defendant's motion for judgment on the pleadings is withdrawn.

166 Defendant orally moves the Court to strike interrogatory No. 10 and the answers thereto. Plaintiffs ask leave of Court to file brief in opposition to defendant's oral motion to strike interrogatory No. 10 and the answers thereto, which the Court takes under advisement.

The Court now overrules plaintiff's motion for default filed February 21, 1956 and amended motion for default filed April 19, 1956.

Overrules defendant's motion to dismissed filed April 24, 1956, and

Denies defendant's motion to strike interrogatory No. 10 and the answers thereto.

The Court now indicates that he will grant plaintiff's motion for summary judgment and requests the attorneys for plaintiffs to prepare an appropriate entry in keeping with the amounts recited in the answers to the interrogatories.

The Court now takes this cause under advisement until Friday, September 14, 1956.

/s/ Cale J. Holder
Judge, United States District Court

Copy to:

Louis Nattkemper, 506 Ohio St., Terre Haute, Ind.
Val J. Mitch, 907 15th St., N. W. Wash. D. C.
William Burke, 7370 Maryland, Clayton, Missouri
John R. Jett, Vigo County Court House, Terre Haute, Ind.

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UNITED STATES DISTRICT COURT
For the Southern District of Indiana
Terre Haute Division

• • (Caption—No. TH55-C-50) • •

MOTION FOR LEAVE TO AMEND MOTION FOR SUMMARY JUDGMENT

(Filed U. S. District Court Sep 14 1956)

Plaintiffs move the Court for leave to amend their motion for summary judgment on file herein in the following particulars:

(1) By making a part thereof, as exhibits, the affidavits of Josephine Roche and Harold H. Bacon, erroneously attached to their brief in support of their motion for summary judgment, as Exhibits A and B, respectively, to the plaintiffs' motion for summary judgment and

(2) By making a part thereof, as exhibits, the interrogatories plaintiffs directed to Carl F. Kumpf, president of the defendant corporation, and the answers thereto as Exhibits C and D, respectively, to plaintiffs' motion for summary judgment.

The grounds of this motion are (a) that the affidavits of Josephine Roche and Harold H. Bacon were considered by the Court as affidavits in support of plaintiffs' motion for summary judgment but through plaintiffs' error were not attached to the motion but were erroneously attached to plaintiffs' brief in support of their motion for summary judgment and (b) that the interrogatories directed by plaintiffs to Carl F. Kumpf, president of the defendant corporation, and the answers thereto which were filed with this Court were not made exhibits to plaintiffs' motion
169 for summary judgment through plaintiffs' oversight but were considered by the Court in plaintiffs' brief

and oral argument in support of their motion.

Dewey and Natthemper
506 Ohio Street
Terre Haute, Indiana
By: /s/ Louis D. Natthemper
Louis D. Natthemper

/s/ Val J. Mitch
Val J. Mitch
907 Fifteenth Street, N. W.
Washington, D. C.

/s/ Harold H. Bacon
Harold H. Bacon
907 Fifteenth Street, N. W.
Washington, D. C.
Attorneys for Plaintiffs,
John L. Lewis, Charles A. Owen and
Josephine Roche, as Trustees of the
United Mine Workers of America
Welfare and Retirement Fund

I hereby certify that copy of the foregoing Motion For Leave To Amend Motion For Summary Judgment was mailed to John R. Jett, Esquire, Attorney for the Defendant, at his office, Vigo County Court House, Terre Haute, Indiana, on the 13th day of September, 1956.

/s/ Harold H. Bacon

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UNITED STATES DISTRICT COURT
For the Southern District of Indiana
Terre Haute Division

• • (Caption—No. TH55-C-50) • •

ORDER

On plaintiffs' motion for leave to amend their motion for summary judgment, and it appearing that justice requires such leave be given, and the Court being fully advised, it is

Ordered:

(1) That the plaintiffs' motion for summary judgment herein be amended in the following respects: that the affidavit of Josephine Roche be made a part thereof as Exhibit A; that the affidavit of Harold H. Bacon be made a part thereof as Exhibit B; that the interrogatories directed to Carl F. Kumpf, president of the defendant corporation, be attached thereto as Exhibit C; and that the answers to interrogatories directed by plaintiffs to Carl F. Kumpf, president of the defendant corporation, be attached thereto as Exhibit D.

Date 14 Sept 1956

/s/ Cale J. Holder
United States District Judge

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United States District Court
For the Southern District of Indiana
Terre Haute Division

• • (Caption—No. TH55-C-50) • •

ORDER AND JUDGMENT

(Filed U. S. District Court Sep 14 1956)

This cause came before the Court upon the motion and amended motion of plaintiffs for default judgment, upon motion of the defendant to dismiss and for judgment on the pleadings, and upon plaintiffs' motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, the moving party in each motion requested oral argument, and defendant's oral motion to strike Interrogatory No. 10 served on the President of the defendant corporation and the answer thereto, filed with the Court, and the Court having considered the pleadings in this action, the affidavits of Josephine Roche, dated May 8, 1956, and Harold H. Bacon, dated May 8, 1956, in support of plaintiffs' motion for summary judgment, no affidavits having been filed in opposition thereto, and having considered the interrogatories served upon the President of the defendant corporation and the answers thereto, the briefs and oral arguments of counsel, defendant having voluntarily withdrawn its motion for judgment on the pleadings, and having found that there is no genuine issue of fact to be submitted to the trial court; it is hereby;

Ordered, that plaintiffs' motion and amended motion for default judgment is overruled in view of defendant's oral motion purging the defendant's default, and it is further;

Ordered, that defendant's motion to dismiss is denied, and it is further;

Ordered, that defendant's oral motion to strike Interrogatory No. 10 and the answer thereto is denied, and it is further;

Ordered, that plaintiffs' motion for summary judgment is in all respects granted, it is further;

174 Ordered, Adjudged and Decreed:

(1) that between the period December 1, 1953, and September 30, 1955, the defendant, Quality Coal Corporation, Incorporated, produced 120,969.48 tons of coal on which a royalty of forty cents (40¢) a ton was due and owing to the plaintiffs in the amount of $48,387.79, of which sum the defendant paid the plaintiffs the amount of $6,799.33, leaving a balance now due and owing by the defendant to the plaintiffs of $41,588.46; and,

(2) that the plaintiffs, John L. Lewis, Charles A. Owen and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund, shall recover of the defendant, Quality Coal Corporation, Incorporated, the sum of $39,955.07 with interest at the rate of 6% per annum from the 30th day of September, 1955; $1,633.39 without interest; and the costs of this action.

Dated 14 Sept 1956

/s/ Cale J. Holder
United States District Judge

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In the District Court of United States
For the Southern District of Indiana
Terre Haute Division

John L. Lewis, Charles A. Owen, Josephine Roche, Trustees United Mine Workers of America Welfare and Retirement Fund
vs.
Quality Coal Corporation

No. TH 55-C-50

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Filed U. S. District Court Oct 15 1956)

Notice is hereby given that the Quality Coal Corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from summary judgment for plaintiff entered in this action on September 14, 1956.

Dated October 15, 1956.

By /s/ John R. Jett
John R. Jett, Attorney
for Defendant

CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing Notice of Appeal from Summary Judgment was mailed to Mr. Louis D. Nattkemper, attorney for Plaintiff, at his office, 506 Ohio Street, Terre Haute, Indiana, on the 15th day of October, 1956.

/s/ John R. Jett
John R. Jett

October 16, 1956

Copy of Notice of Appeal mailed counsel for plaintiffs:

Dewey & Nattkemper, 506 Ohio St., Terre Haute, Indiana
Val J. Mitch, 907 Fifteenth St., N.W. Washington, D.C.
Harold H. Bacon, 907 Fifteenth St., N.W. Washington, D.C.

/s/ Robert G. Newbold
Clerk, United States District Court
Southern District of Indiana

(Seal)